

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE CLOROX CONSUMER) Master File No. 12-00280 SC
LITIGATION)
) ORDER DENYING MOTION FOR CLASS
) CERTIFICATION

This Document Relates To:
ALL ACTIONS

I. INTRODUCTION

Plaintiffs bring this putative class action against Defendant The Clorox Company ("Clorox") in connection with its marketing and advertising of Fresh Step cat litter. Plaintiffs now move to certify five plaintiff sub-classes, each distinguished by the state in which the plaintiff purchased his or her cat litter. ECF No. 89 ("Mot.") (filed under seal) at 7-14. The motion is fully briefed.¹

¹ ECF Nos. 108-4 ("Opp'n") (filed under seal); 115-4 ("Reply") (filed under seal); 127 ("Pls. Supp. Brief"); 128-4 ("Defs. Supp. Brief") (filed under seal). Clorox has moved to strike new arguments and evidence from Plaintiffs' reply -- mainly regarding ascertainability -- or, in the alternative, for leave to file a surreply. ECF No. 116 ("MTS"). Plaintiffs have opposed these motions. ECF No. 118 ("MTS Opp'n"). Because Clorox devoted a large section of its brief to ascertainability, it was appropriate for Plaintiffs to respond. Additionally, one of the cases on which Clorox primarily relies was decided only one day before Plaintiffs filed their motion. Thus the Court is willing to consider the

Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for disposition without oral argument. For the reasons set forth below, Plaintiffs' motion is DENIED.

II. BACKGROUND

A detailed discussion of this case's background appears in the Court's order on Clorox's motion to dismiss. See In re Clorox Consumer Litig., 894 F. Supp. 2d 1224, 1228-31 (N.D. Cal. 2012). The basic facts are these: Clorox's Fresh Step cat litter uses carbon to eliminate cat litter odors, whereas other cat litter products typically use baking soda. Clorox's marketing campaign allegedly conveys that Fresh Step is more effective at eliminating cat odors than products that do not contain carbon. Plaintiffs, consumers of Fresh Step from five different states, allege that these statements are false and misleading and are contradicted by scientific studies.

The lead plaintiffs in the case purport to represent five sub-classes, each identified by the state in which the plaintiff purchased his or her Clorox cat litter. Specifically, Plaintiffs seek certification of sub-classes including all purchasers of Fresh Step between October 2010 and the present in the states of California, Florida, New Jersey, New York, and Texas. Mot. at 7-14.

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arguments and new evidence that Plaintiffs offer for the first time on reply. However, the Court's lenience should not deprive Clorox of an opportunity to respond. Clorox's motion to strike is DENIED, but its alternative motion to file a surreply is GRANTED.

1 **III. LEGAL STANDARD**

2 "The class action is an exception to the usual rule that
3 litigation is conducted by and on behalf of the individual named
4 parties only." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541,
5 2550 (2011) (internal quotations and citations omitted). "In order
6 to justify a departure from that rule, a class representative must
7 be part of the class and possess the same interest and suffer the
8 same injury as the class members." Id. (internal quotations and
9 citations omitted). "As a threshold matter, and apart from the
10 explicit requirements of Rule 23(a), the party seeking class
11 certification must demonstrate that an identifiable and
12 ascertainable class exists." Wolph v. Acer Am. Corp., 272 F.R.D.
13 477, 482 (N.D. Cal. 2011).

14 Under Rule 23(a), four prerequisites must be satisfied for
15 class certification:

16 (1) the class is so numerous that joinder of all members
17 is impracticable;

18 (2) there are questions of law or fact common to the
19 class;

20 (3) the claims or defenses of the representative parties
21 are typical of the claims or defenses of the class; and

22 (4) the representative parties will fairly and adequately
23 protect the interests of the class.

24 Fed. R. Civ. P. 23(a).

25 A plaintiff also must satisfy one or more of the separate
26 prerequisites set forth in Rule 23(b). Plaintiffs move for
27 certification under Rule 23(b)(3), which requires that common
28 questions of law or fact predominate and that the class action is
superior to other available methods of adjudication.

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule -- that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Dukes, 131 S. Ct. at 2551 (emphasis deleted). Analysis of these factors "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id. at 2552 (internal quotations and citations omitted). "Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation." Id.

IV. DISCUSSION

Plaintiffs' motion for class certification is denied because the class is not ascertainable and because common questions do not predominate, as required by Rule 23(b)(3). Accordingly, this discussion focuses mostly on those issues, but the Court mentions the other class certification requirements (at least briefly) for the sake of completeness.

A. Ascertainability

"A class definition should be precise, objective, and presently ascertainable." O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998) (internal quotations omitted). "While the identity of the class members need not be known at the time of certification, class membership must be clearly

ascertainable. The class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member." Wolph, 272 F.R.D. at 482 (internal citations omitted). Though there is a split among district courts in the Ninth Circuit on the issue, the undersigned has followed the guidance of the Third Circuit in requiring plaintiffs to "show, by a preponderance of the evidence, that the class is currently and readily ascertainable based on objective criteria." Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013) (internal quotation marks omitted). In a consumer class action, like this one, where Plaintiffs intend to rely on retailer records, Plaintiffs must produce sufficient evidence to show that such records can be used to identify class members. Sethavanish v. ZonePerfect Nutrition Co., 12-2907-SC, 2014 WL 580696, at *4-6 (N.D. Cal. Feb. 13, 2014) (citing Carrera, 727 F.3d at 308-09). Affidavits from consumers alone are insufficient to identify members of the class. Carrera, 727 F.3d at 306.

The problem Plaintiffs face is figuring out exactly who purchased Fresh Step during the class period. In their motion, Plaintiffs do not propose any method for making this determination. None of the named plaintiffs in this case, for example, kept receipts for their purchases of Fresh Step. ECF Nos. 108-8 ("Butler-Furr Depo.") at 39:3-5; 109-2 ("Lenz Depo.") at 14:22-24; 109-3 ("Luszcz Depo.") at 44:1-13; 109-4 ("Kowalewski Depo.") at 49:24-50:5; 109-5 ("Doyle Depo.") at 28:16-18.² Nor do consumers necessarily remember when they bought cat litter, or which sizes,

² One plaintiff, Ms. Kristin Luszcz, apparently began keeping receipts from her Fresh Step purchases after filing this lawsuit. Luszcz Depo. at 44:1-6.

1 types, or even brands of cat litter they purchased. Butler-Furr
2 Depo. at 39:6-10; Kowalewski Depo. at 49:2-10; Doyle Depo. at
3 27:22-28:9. One of the plaintiffs in this case apparently cannot
4 even recall whether she bought Fresh Step during the class period;
5 Ms. Doyle testified at her deposition that the last time she bought
6 Fresh Step was "around 2009." Doyle Depo. at 36:14-18, 37:17-21,
7 54:14-55:21. But the class includes only persons who purchased
8 Fresh Step between October 2010 and the present. That is precisely
9 why affidavits from consumers are insufficient to identify the
10 class.

11 In their reply brief, Plaintiffs indicate that the classes
12 might be ascertained by obtaining records from Clorox or from the
13 retailers who sell Fresh Step. Reply at 8. Plaintiffs assert that
14 this method of ascertaining the classes will capture "a substantial
15 number of Class members." Id. To support their assertions,
16 Plaintiffs contacted sixteen Fresh Step retailers, which together
17 account for about 85 percent of Fresh Step sales nationwide. ECF
18 No. 115-8 ("Dearman Decl.") (filed under seal) ¶ 15. Of those
19 sixteen retailers, five have not responded or refused to turn over
20 any information. Id. ¶¶ 17-19. Six of the retailers do not have
21 any method for tracking Fresh Step purchases. Id. ¶¶ 20. Of the
22 five retailers who had relevant information and were willing to
23 provide it, few provided sufficient information to help Plaintiffs
24 ascertain the class.

25 Target is the most helpful for Plaintiffs. It can identify
26 customers who made purchases with "trackable" cards. Id. Ex. 16
27 (filed under seal). In Target's case, the purchaser is
28 identifiable in about 67 percent of (approximately 18 million)

1 Fresh Step transactions. Dearman Decl. ¶ 21(b), Ex. 16.

2 Similarly, PetSmart can identify 2.1 million Fresh Step customers,
3 but it is not clear what portion of their Fresh Step sales those
4 identifiable customers represent.

5 Pet Supermarket, Inc. provided a spreadsheet containing
6 information on purchasers of Fresh Step since 2009. Plaintiffs
7 claim that the spreadsheet identifies purchasers for 74,977 units
8 of Fresh step between 2010 and present. Id. ¶21(a), Ex. 16 (filed
9 under seal). Defendants counter, however, that "the vast majority"
10 of consumers identified on the spreadsheet are not members of any
11 putative class -- only five are from New Jersey, and only ten are
12 from New York. ECF No. 117-3 ("Surreply") at 3. Regardless, Pet
13 Supermarket can only identify purchasers who used the company's
14 loyalty card program. Dearman Decl. Ex. 15 (filed under seal).
15 Those 74,977 units represent only a tiny fraction of Fresh Step
16 purchases.

17 Wal-Mart and Sam's Club estimate that approximately 4.3
18 million individuals may have purchased Fresh Step at their retail
19 locations or online. However, in only about 18 percent of
20 transactions are the individual customers identifiable. Dearman
21 Decl. ¶ 21(c).

22 Clorox itself does not sell Fresh Step directly to consumers,
23 but it does have a "Paw Points" loyalty program that Plaintiffs
24 argue might be able to identify some class members. Reply at 8.
25 However, only about five percent of Fresh Step purchases in
26 California, New York, New Jersey, Texas, and Florida were
27 registered through the Paw Points program. Even were this number
28 larger, the Paw Points program's utility in determining class

1 membership would be limited. The program does not collect
2 information on the date of purchase, and the location it records is
3 the customer's address, rather than the location of the store where
4 the product was purchased. Dearman Decl. ¶¶ 25-26.

5 Plaintiffs' evidence demonstrates quite clearly that there is
6 no administratively feasible method for ascertaining the plaintiff
7 classes. Customers do not remember when they purchased Fresh Step
8 cat litter or how much they bought. Of the retailers who responded
9 to Plaintiffs' inquiries, six do not have any way of identifying
10 Fresh Step purchasers. Five can track some customers through
11 loyalty programs or store credit cards, but three of those five can
12 identify customers in only a small minority of Fresh Step
13 transactions. Ultimately, only two of the sixteen retailers
14 Plaintiffs contacted can help identify a substantial number of
15 plaintiffs. The Court finds that there is no administratively
16 feasible method of determining membership for the vast majority of
17 potential members of Plaintiffs' proposed sub-classes. Therefore,
18 Plaintiffs' proposed classes are not ascertainable. On this ground
19 alone, their motion is DENIED.

20 **B. Rule 23(a) Requirements**

21 Rule 23(a) requires numerosity, commonality, typicality, and
22 adequacy of representation. See Mazza v. Am. Honda Motor Co.,
23 Inc., 666 F.3d 581, 588 (9th Cir. 2012).

24 **1. Numerosity**

25 Federal Rule of Civil Procedure 23(a)(1) requires that the
26 proposed classes be "so numerous that joinder of all members is
27 impracticable." Generally, "classes of forty or more are
28 considered sufficiently numerous." Delarosa v. Boiron, Inc., 275

1 F.R.D. 582, 587 (C.D. Cal. 2011). Plaintiffs demonstrate using
2 sales figures that at least tens of thousands of people purchased
3 Fresh Step in each of the relevant states. Defendants do not
4 contest these claims. The Court finds that the numerosity
5 requirement of Rule 23 is met.

6 **2. Commonality**

7 Rule 23 also requires that "there be questions of law or fact
8 common to the class." Fed. R. Civ. P. 23(a)(2). "This does not
9 mean merely that [all plaintiffs have] suffered a violation of the
10 same provision of law. . . . Their claims must depend upon a
11 common contention That common contention, moreover, must
12 be of such a nature that it is capable of classwide resolution --
13 which means that determination of its truth or falsity will resolve
14 an issue that is central to the validity of each one of the claims
15 in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541,
16 2551 (2011). Nonetheless, "Rule 23(a)(2) has been construed
17 permissively." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th
18 Cir. 1998).

19 Plaintiffs argue that there are a number of common questions
20 of law and fact that govern the claims of all members of the
21 proposed classes. These questions mostly concern Clorox's claims
22 that Fresh Step is superior to other cat litter brands -- such as
23 the truthfulness and materiality of those claims, and whether they
24 were likely to deceive a reasonable consumer. Mot. at 18. In
25 response, Clorox argues that those questions are not actually
26 common to all members of the proposed classes. Plaintiffs'
27 proposed classes include all purchasers of Fresh Step. Clorox
28 argues that some Fresh Step purchasers likely never saw the

1 allegedly misleading statements, did not rely on them, or did not
2 actually find them to be false. Therefore, Clorox contends,
3 questions regarding those claims are not common to the entire
4 class.

5 The Court need not resolve this issue. Rule 23(b)(3) includes
6 a related, but additional, requirement that these common questions
7 predominate over questions affecting only individual class members.
8 "The commonality preconditions of Rule 23(a)(2) are less rigorous
9 than the companion requirements of Rule 23(b)(3)." Hanlon, 150
10 F.3d at 1019. Consequently the Court assumes arguendo that at
11 least one of these questions is common to the proposed classes.
12 But, as discussed in Part IV.C.1, below, the Court finds that the
13 questions Plaintiffs cite as common to the classes do not
14 predominate over individual concerns.

15 3. Typicality

16 The Ninth Circuit has interpreted the typicality requirement,
17 like the commonality requirement, permissively. Typicality
18 requires that the class representatives' claims be "reasonably co-
19 extensive with those of absent class members; they need not be
20 substantially identical." Hanlon, 150 F.3d at 1020. Clorox argues
21 that Plaintiffs' claims are not typical because consumers of Fresh
22 Step used and experienced the product differently. For example,
23 one plaintiff claims that Fresh Step did not work at all, while
24 another says it was as effective as any other brand of cat litter
25 (just not better). See Lenz Depo. at 76:4-19; ECF No. 109-1
26 ("Sterritt Depo.") at 131:6-14; see also Opp'n at 39-40.

27 The Court finds these arguments unconvincing. "In determining
28 whether typicality is met, the focus should be on the defendants'

1 conduct and plaintiff's legal theory, not the injury caused to the
2 plaintiff. Typicality does not require that all class members
3 suffer the same injury as the named class representative." Simpson
4 v. Fireman's Fund Ins. Co., 231 F.R.D. 391, 396 (N.D. Cal. 2005).
5 All of the claims that plaintiffs bring here are similar: they all
6 allege that they saw Clorox's allegedly misleading statements,
7 purchased Fresh Step because of those statements, paid more for
8 Fresh Step than they would have for other brands, and did not find
9 Fresh Step to work better than other brands. See Reply at 13.
10 Clorox's alleged conduct and Plaintiffs' legal theories are the
11 same, regardless of variations in their individual experiences with
12 Fresh Step.

13 Of course, these similarities apply only to the extent that
14 class members have any claim at all. Plaintiffs' proposed classes
15 are hopelessly overbroad and include many persons who likely never
16 saw the allegedly misleading statements. Those class members
17 therefore could not have relied on the alleged misrepresentations
18 to purchase Fresh Step. However, the clearest analytical framework
19 for the over breadth of the proposed classes is the predominance
20 issue (again, see Part IV.C.1, below).

21 **4. Adequacy of Representation**

22 The Ninth Circuit applies a two-part test to determine the
23 adequacy of class representation. First, the representative
24 plaintiffs and their counsel must not have conflicts of interest
25 with other class members. Second, the representative plaintiffs
26 and their counsel must prosecute the action vigorously on behalf of
27 the class. Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir.
28 2003).

1 There is no evidence of conflicts of interest between the lead
2 plaintiffs, their counsel, and other class members. To the extent
3 that members of the proposed classes have claims against Clorox,
4 those claims all arise under the same legal theories and
5 substantially similar facts. Thus, there is no indication that
6 their theories of liability or legal arguments will create any sort
7 of conflict.

8 With regard to the second part of the test, there is again
9 nothing to suggest that the lead plaintiffs or their counsel will
10 fail to adequately represent the class. Plaintiffs' attorneys are
11 experienced class action litigators who have prosecuted this
12 litigation since it was filed in early 2012.

13 Clorox argues in a footnote that Plaintiffs do not adequately
14 represent their sub-classes for a variety of reasons including lack
15 of typicality, lack of membership in the proposed classes, criminal
16 history, and credibility concerns. Opp'n at 40 n.19. Because the
17 Court denies Plaintiffs' motion on other grounds, it declines to
18 examine these specific claims.

19 **C. Rule 23(b)(3) Requirements**

20 In addition to satisfying the requirements of Rule 23(a), a
21 class action must fit at least one of the categories defined in
22 Rule 23(b). Plaintiffs assert that this class action qualifies
23 under Rule 23(b)(3). Mot. at 22. That Rule requires the Court to
24 find that "questions of law or fact common to class members
25 predominate over any questions affecting only individual members,
26 and that a class action is superior to other available methods for
27 fairly and efficiently adjudicating controversy." Fed. R. Civ. P.
28 23(b)(3).

1 **1. Predominance**

2 The burden of demonstrating that common questions predominate
3 lies with the party seeking class certification. Zinser v. Accufix
4 Research Inst., Inc., 253 F.3d 1180, 1188 (9th Cir. 2001).

5 Plaintiffs argue that questions common to all class members
6 predominate here. These questions mostly concern Clorox's claims
7 that Fresh Step is superior to other cat litter brands. Mot. at
8 18. Clorox argues that common issues do not predominate for a
9 variety of reasons, including that many, or even most, members of
10 the proposed classes did not see, much less rely upon, the
11 allegedly misleading superiority claims. Opp'n at 25-30. The
12 Court finds that these individual questions predominate; Plaintiffs
13 cannot demonstrate that enough members of the proposed classes saw
14 the allegedly misleading messages.

15 This inquiry is complicated by the fact that Plaintiffs have
16 amended their complaint, adding new statements they claim were
17 misleading to consumers. Plaintiffs' original complaint only
18 identified allegedly misleading statements in Clorox's television
19 commercials. ECF No. 1 ¶¶ 1-8. Five days after moving to file
20 certain portions of their class certification motion under seal,
21 Plaintiffs filed their third amended complaint, alleging that some
22 variants of Fresh Step packaging also included misleading
23 statements. ECF No. 93 ("TAC") ¶¶ 2-9. However, the third amended
24 complaint still defines the beginning of the class period by the
25 airdates of the first television commercials, and the bulk of
26 Plaintiffs' allegations still focuses on the commercials. Id. ¶¶
27 6-9, 33-39.

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1 Clorox argues that the television commercials reached only a
2 very limited audience. The four commercials Plaintiffs identify
3 ran for a total of only sixteen months. Reply at 1. Additionally,
4 in mid-2011, several months before this class action was filed,
5 Clorox commissioned an advertising analytics company to assess the
6 commercials' effectiveness. The results indicated that "not enough
7 people are seeing, or possibly remembering, the advertising." See
8 ECF No. 108-25, at CL1560 (filed under seal); Opp'n at 9-10.
9 Plaintiffs counter that the misleading statements also appear on
10 Fresh Step packaging, resulting in a "uniform message to
11 consumers." Reply at 1.

12 That is not the case. The allegedly misleading statements are
13 limited to claims that Fresh Step eliminates odors better than
14 other brands because it contains carbon. The complaint does not
15 allege that statements that Fresh Step contains carbon, or even
16 that claims that carbon eliminates odor, were misleading.
17 According to the complaint, only claims that Fresh Step is superior
18 to other brands because of its carbon content is misleading. This
19 so-called "superiority message" appeared only on the back of some
20 Fresh Step packaging during the proposed class period. Plaintiffs
21 provide two examples of such packaging; Clorox has submitted ten
22 versions of Fresh Step packaging that express no superiority
23 claims.³ Plaintiffs do not produce any evidence as to the

24 ³ Clorox asserts that "nearly ten dozen different packagings were
25 used during the proposed class period, almost all of which did not
26 include the carbon superiority language." Opp'n at 13. However,
27 Clorox does not cite to the record in support of this proposition.
28 Nonetheless, Plaintiffs do not dispute Clorox's figure. Plaintiffs
provide only two examples of packaging containing the "superiority
message," while Clorox provides ten that do not. See TAC ¶ 5, ECF
No. 109 ("Lee Decl.") Exs. 39-44, 50-53.

1 percentage of Fresh Step units that included the allegedly
2 misleading messages. Moreover, Clorox has provided evidence that
3 only 11 percent of consumers read the back panel of cat litter
4 packaging.⁴ ECF No. 108-41, at CL5029 (filed under seal).

5 The effect that this lack of a consistent message has on
6 Plaintiffs' motion varies according to state law. The consumer
7 protection laws in California, Texas, New York, New Jersey, and
8 Florida differ significantly in the protection they offer to
9 potential class action plaintiffs. Generally speaking, however,
10 two concepts are crucial: exposure and causation. That is,
11 plaintiffs must be exposed to allegedly misleading statements, and
12 those statements must cause them harm. All states require both,
13 though the required proof of causation varies greatly; indeed, some
14 states require reliance rather than causation. For example, New
15 Jersey law infers causation in many instances, while Texas
16 generally requires proof that each individual plaintiff relied on
17 the allegedly misleading statements. Plaintiffs do not distinguish
18 between reliance and exposure, and they offer no individualized
19 proof of either. Though Plaintiffs may be entitled to a class-wide
20 presumption of reliance in some states, a plaintiff can only
21 reasonably be presumed to rely upon information he actually
22 received. The problem Plaintiffs face is that there is powerful
23 evidence that most members of the proposed classes probably never

24 ⁴ At least, that is how Clorox interprets the survey data. See
25 Opp'n at 13. However, the Court's reading of the evidence is that
26 only 11 percent of customers who read the packaging at all read the
27 back panel. Only 37 percent of customers read the packaging at
28 all, and only 11 percent of those read the back panel. Thus it
appears that only about four percent of all cat litter customers
read the back panel. Regardless, the percentage of customers who
read the back panel is very low.

1 saw the allegedly misleading statements. The television
2 commercials ran for only a small part of the class period, and the
3 superiority claims appeared in small print on the back of a
4 minority of Fresh Step packages. Regardless of the generosity of
5 the various states' causation or reliance requirements, Plaintiffs
6 simply cannot demonstrate that the proposed classes were uniformly
7 exposed to the allegedly misleading messages. The Court proceeds
8 to analyze each proposed sub-class by state.

9 **i. California**

10 Under California law, a class-wide presumption of reliance
11 upon an allegedly misleading message may be appropriate in some
12 cases. Plaintiffs urge the Court to "presume[] that all class
13 members relied on Clorox's odor superiority misrepresentation."
14 Reply at 10. Bizarrely, Plaintiffs cite a California Supreme Court
15 case for the proposition that "[i]t is well-settled in the Ninth
16 Circuit that class-wide reliance is presumed where a
17 misrepresentation is 'material.'" Id. It is possible that
18 Plaintiffs meant to argue that California Supreme Court precedent
19 governs the application of California law when federal courts apply
20 it.⁵ Even if that were Plaintiffs' intended argument, they read
21 the case they cite for a much broader proposition than it supports.

22
23 ⁵ Plaintiffs also cite a single case from this District that
24 followed the California case on a different issue, holding that
25 unnamed class members in an action brought under California's
26 Unfair Competition Law need not establish standing. Reply at 10
27 (citing Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365,
28 376 (N.D. Cal. 2010)). The issue here is not standing but
predominance, and the Ninth Circuit has made clear that they are
distinct inquiries. See Mazza, 666 F.3d at 595-96 (class had
standing despite lack of proof of reliance or injury, but lack of
evidence of reliance still meant that individual questions
predominated).

1 Plaintiffs appear, remarkably, to argue that any materially
2 misleading product advertisement is automatically presumed under
3 California law to reach and influence all of the product's
4 customers. See Id. (citing In re Tobacco II Cases, 46 Cal. 4th
5 298, 326-27 (Cal. 2009)). The presumption established in Tobacco
6 II was much more limited, and it applied only to reliance, not
7 exposure. That is, it may be justified to presume that consumers
8 who actually saw a materially misleading advertisement relied upon
9 it. However, Tobacco II does not mean that Plaintiffs are entitled
10 to a presumption that every purchaser of Fresh Step during the
11 class period was exposed to the misleading statements.

12 Tobacco II involved cigarette advertising, and presumptions of
13 exposure and reliance were justified by a "decades-long campaign of
14 the tobacco industry to conceal the health risks of its product."
15 Tobacco II, 46 Cal. 4th at 327. Since Tobacco II, both California
16 state courts and federal courts in the Ninth Circuit -- when
17 applying California law -- have refused to presume so broadly in
18 other contexts. See, e.g., Mazza, 666 F.3d at 595 (presumption of
19 reliance not justified under California law where it was likely
20 that "many class members were never exposed to the allegedly
21 misleading advertisements"); ConAgra Foods, C 12-01633 CRB, 2014 WL
22 2702726, at *14 (N.D. Cal. June 13, 2014) (examining treatment of
23 Tobacco II in the Ninth Circuit and reaching same conclusion);
24 Cohen v. DIRECTV, Inc., 178 Cal. App. 4th 966, 973 (Cal. Ct. App.
25 2009) ("An inference of classwide reliance cannot be made where
26 there is no showing that representations were made uniformly to all
27 members of the class.").

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1 "In the absence of the kind of massive advertising campaign at
2 issue in Tobacco II, the relevant class must be defined in such a
3 way as to include only members who were exposed to advertising that
4 is alleged to be materially misleading." Mazza, 666 F.3d at 596.
5 A sixteen-month television advertising campaign combined with
6 messages in small print on the back of a small minority of Fresh
7 Step packaging does not even approach the "massive advertising
8 campaign" at issue in Tobacco II. Plaintiffs' proposed class --
9 which includes all purchasers of Fresh Step in California over a
10 period of almost four years -- is not defined so as to include only
11 members who were exposed to the allegedly misleading material.
12 Without any evidence that Clorox included its superiority message
13 on a significant portion of Fresh Step products, or that consumers
14 actually saw it, Plaintiffs have no basis for their claim that
15 Clorox presented a uniform message to its customers. See also
16 ConAgra Foods, 2014 WL 2702726, at *14 (variations in labeling of
17 food products precluded cohesion among class members necessary for
18 class-wide presumption of reliance).

19 The Court finds that Plaintiffs are not entitled to a class-
20 wide presumption of reliance. Therefore, Plaintiffs must define
21 their classes to include only persons exposed the allegedly
22 misleading advertisement. Because Plaintiffs fail to do so,
23 "common questions of fact do not predominate where an
24 individualized case must be made for each member showing reliance."
25 Id. at 596. Plaintiffs' motion to certify the California sub-class
26 is DENIED because issues common to all class members do not
27 predominate over questions applicable only to individual members.

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1 **ii. Texas**

2 Plaintiffs' Texas sub-class brings a claim under the Texas
3 Deceptive Trade Practices -- Consumer Protection Act Section
4 17.50(a)(1) ("DTP-CPA"). Pls. Supp. Brief. at 6. The DTP-CTA
5 requires a showing of reliance. Tex. Bus. & Com. Code § 17.50(B).
6 Individualized proof is required for Plaintiffs' claim under the
7 DTP-CPA. See Peltier Enters., Inc. v. Hilton, 51 S.W.3d 616, 624
8 (Tex. App. 2000) ("This claim requires individualized proof because
9 reliance is an essential element of this DTPA claim."). By
10 requiring individual proof of reliance, the Texas Supreme Court
11 "did not entirely preclude class actions in which reliance was an
12 issue, but it did make such cases a near-impossibility." Fid. &
13 Guar. Life Ins. Co. v. Pina, 165 S.W.3d 416, 423 (Tex. App. 2005).

14 Plaintiffs' only response is to urge the court to "infer[]
15 that no reasonable consumer would pay more for cat litter that said
16 it provided superior odor control if it did not, in fact, provide
17 that benefit." Pls. Supp. Brief at 7 (emphasis in original). That
18 sort of inference is inappropriate under Texas law. See Pina, 165
19 S.W.3d at 424 ("Despite the fact that the misrepresentation clearly
20 occurred and the purchases were then made by all class members, the
21 class also had to show that every purchaser relied on the
22 misrepresentation in making the purchase."). Even if such an
23 inference were permitted, Clorox has provided sufficient evidence
24 to rebut any claim that the inference would apply uniformly across
25 the Texas sub-class. This strict interpretation of Texas consumer
26 protection laws has precluded class certification due to lack of
27 predominance in cases analogous to this one. See, e.g., Henry
28 Schein, Inc. v. Stromboe, 102 S.W.3d 675, 694 (Tex. 2002) ("[T]he

1 plaintiffs in this case have failed to show that individual issues
 2 of reliance do not preclude the necessary finding of
 3 predominance"); Pina, S.W.3d at 425 ("[A]ppellees failed to
 4 show that individualized determinations of reliance would not
 5 predominate over common questions of law or fact."); Ford Motor Co.
 6 v. Ocanas, 138 S.W.3d 447, 454 (Tex. App. 2004) ("[A]ppellee failed
 7 to show that individualized determinations will not predominate
 8 over common questions of law or fact").⁶

9 The Court finds that Texas law also precludes a presumption of
 10 reliance in Plaintiffs' favor. Accordingly, the Court DENIES
 11 Plaintiffs' motion as to the Texas sub-class because issues common
 12 to all class members do not predominate over questions applicable
 13 only to individual members.

14 **iii. New York**

15 The New York sub-class brings claims under New York General
 16 Business Law Sections 349 and 350. Neither of these claims
 17 includes a reliance requirement.⁷ Even so, New York law requires
 18 that "[i]n a class action alleging deceptive acts and practices and
 19 false advertising, the proof must show that each plaintiff was
 20 reasonably deceived by the defendant's misrepresentations or
 21 omissions and was injured by reason thereof." Solomon v. Bell Atl.

22
 23 ⁶ These cases applied Texas Rule of Civil Procedure 42(b)(3), which
 is virtually identical to Federal Rule of Civil Procedure 23(b)(3).

24 ⁷ Plaintiffs' briefs are contradictory on this issue. Compare Mot.
 25 at 12 ("A claim under Section 349 does not require a demonstration
 26 of reliance, although a claim under Section 350 does.") with Pls.
 Supp. Brief at 4 ("Reliance is not an element of either claim.").
 According to New York law, the latter statement is accurate. See
 27 Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941 (N.Y. 2012)
 ("To the extent that the Appellate Division order imposed a
 28 reliance requirement on General Business Law §§ 349 and 350 claims,
 it was error.").

1 Corp., 9 A.D.3d 49, 52 (N.Y. App. Div. 2004). Plaintiffs argue
 2 that "causation does not require individualized proof and can be
 3 resolved on a classwide basis where, as here, a misrepresentation
 4 is made uniformly to the class." Mot. at 13. Once again,
 5 Plaintiffs are stymied by the fact that the alleged
 6 misrepresentations were not made uniformly to the class.

7 Solomon illustrates this problem as it applies to cases, like
 8 this one, where allegedly misleading statements did not necessarily
 9 reach every member of a putative class. The Solomon court held
 10 that "class certification is not appropriate where the plaintiffs
 11 do not point to any specific advertisement or public pronouncement
 12 by the [defendants] which was undoubtedly seen by all class
 13 members." Solomon, 9 A.D.3d at 53 (citing Small v. Lorillard
 14 Tobacco Co., Inc., 252 A.D.2d 1, 9 (N.Y. App. Div. 1998), aff'd, 94
 15 N.Y.2d 43 (N.Y. 1999)). Federal courts have followed these New
 16 York cases in denying class certification:

17
 18 Plaintiffs' proposed class makes no attempt to limit the
 19 class to persons who saw or heard a common
 20 misrepresentation Distinguishing between the
 21 different representations made to putative class members
 22 would require individualized inquiries not suitable for
 23 class litigation. Accordingly, this element supports
 24 denying class certification.

25 In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II), CIV.A.
 26 03-4558, 2012 WL 379944, at *14 (D.N.J. Feb. 6, 2012). Like the
 27 plaintiffs in Ford, Solomon, and Small, Plaintiffs in this case
 28 failed to limit their proposed classes to persons who saw or heard
 a common misrepresentation. As in Solomon, "the individual
 plaintiffs did not all see the same advertisements; some saw no
 advertisements at all." Solomon, 9 A.D.3d at 53. Nor do

1 Plaintiffs point to any specific advertisement that was seen by all
2 class members. Rather, Plaintiffs point to a series of television
3 commercials and statements that appeared on a small minority of
4 Fresh Step packaging. Plaintiffs have produced no evidence
5 whatsoever as to which or how many members of their proposed
6 classes ever saw these misrepresentations. Nor do they attempt to
7 limit any of their proposed classes to persons who saw these
8 alleged misrepresentations. As a result, common questions do not
9 predominate over individual issues under New York law, either.
10 Plaintiffs' motion to certify the New York sub-class is therefore
11 DENIED.

12 **iv. New Jersey**

13 The parties agree that New Jersey imposes an "ascertainable
14 loss" requirement, rather than a reliance element through its
15 Consumer Fraud Act ("NJCFA"). Pls. Supp. Brief at 5-6; Defs. Supp.
16 Brief at 8-9; see also Elias v. Ungar's Food Prods., Inc., 252
17 F.R.D. 233, 239 (D.N.J. 2008) ("In place of the traditional
18 reliance element of fraud and misrepresentation, we have required
19 that plaintiffs demonstrate that they have sustained an
20 ascertainable loss.") (quoting Int'l Union of Operating Eng'rs
21 Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 391
22 (N.J. 2007)). Thus stating a claim under the NJCFA requires
23 alleging three elements: (1) unlawful conduct; (2) an ascertainable
24 loss; and (3) a causal relationship between the defendants'
25 unlawful conduct and the plaintiff's ascertainable loss. Merck,
26 192 N.J. at 389.

27 To establish the required causal relationship, the New Jersey
28 plaintiffs rely upon "a presumption of reliance and/or causation"

1 developed in Varacallo v. Massachusetts Mutual Life Insurance Co.,
2 752 A.2d 807, 817-18 (N.J. Super. Ct. App. Div. 2000). Varacallo
3 specifically dealt with that presumption in situations where
4 "omissions of material fact are common to the class." Id. at 817.
5 However, at least one federal court has extended the Varacallo
6 presumption to affirmative misrepresentations. See Elias, 252
7 F.R.D. at 238. Even assuming that the Elias court correctly
8 extended Varacallo, Plaintiffs in this case are still not entitled
9 to that presumption. In Elias, the court wrote that the allegedly
10 misleading "statements to each purchaser are finite and readily
11 identifiable." Id. Additionally, the Elias court found that
12 "defendants' conduct subjected each purchaser to the same wrongful
13 course of conduct and thereby produced the same claims, supported
14 by the same evidence and responded to by defendants with the same
15 defenses." Id. at 238-39.

16 The record simply does not support such a finding here. The
17 alleged misrepresentations were made in television advertisements
18 that ran for about 16 months of the nearly four-year class period
19 and in small print on the back of a minority of Fresh Step
20 packagings. It is likely that the majority of members of the New
21 Jersey sub-class never saw the allegedly misleading claims.
22 Consequently, Clorox's statements to each purchaser are not readily
23 identifiable; Clorox's conduct did not subject each purchaser to
24 the same wrongful conduct; and individualized evidence will be
25 required to support the New Jersey plaintiffs' claims. Those
26 individual questions preclude a finding that questions common to
27 the New Jersey sub-class predominate over individualized issues.
28 Plaintiffs' motion to certify the New Jersey sub-class is DENIED.

1 **v. Florida**

2 Florida consumer protection law does not require reliance but
3 does require causation. The Florida Deceptive and Unfair Trade
4 Practices Act ("FDUTPA") permits a person "who has suffered a loss
5 as a result of a violation of this part" to recover actual damages.
6 Fla. Stat. § 501.211(2) (emphasis added). One key Florida case on
7 the reliance issue is Davis v. Powertel, Inc., 776 So. 2d 971, 973
8 (Fla. Dist. Ct. App. 2000) ("A party asserting a deceptive trade
9 practice claim need not show actual reliance on the representation
10 or omission at issue."). However, the Powertel decision has since
11 been criticized for its failure to analyze the causation element.
12 See Pop's Pancakes, Inc. v. NuCO2, Inc., 251 F.R.D. 677, 686-87
13 (S.D. Fla. 2008) (collecting cases). Equally important, the
14 Powertel court has since clarified that "[i]t does not follow,
15 however, that because class litigation is possible in a statutory
16 action for a deceptive trade practice, that it will always be
17 appropriate. . . . We did not suggest otherwise in Powertel."
18 Egwatu v. S. Lubes, Inc., 976 So. 2d 50, 53 (Fla. Dist. Ct. App.
19 2008). In Egwatu, the court concluded "that class litigation would
20 be impractical because there would be many differences in the facts
21 supporting the claims of the individual plaintiffs. This conclusion
22 was based on the fact that the defendants have employed a variety
23 of methods over the years to inform customers [of the alleged
24 misrepresentation]." Id.

25 Similarly, Plaintiffs allege here that Clorox employed a
26 variety of methods over the years -- three different television
27 commercials and two varieties of Fresh Step packaging -- to claim
28 that Fresh Step is superior to other brands. The Court finds that,

1 as in Egwatu, there will be "many differences in the facts
2 supporting the claims of the individual plaintiffs." Id. Many
3 members of the proposed Florida sub-class never saw the alleged
4 misrepresentations. Determining whether any individual member of
5 the Florida sub-class has a claim against Clorox will therefore
6 depend upon whether that person actually saw the misrepresentation.
7 If a class member never saw Clorox's superiority message, it is
8 impossible that he suffered damages as a result of Clorox's
9 conduct. The Court finds that questions common to the Florida sub-
10 class do not predominate over such individualized issues.
11 Accordingly, Plaintiffs' motion to certify the Florida sub-class is
12 DENIED.

13 **2. Measurement of Damages on a Class-Wide Basis**

14 The Supreme Court has interpreted Rule 23(b)(3) predominance
15 to include a requirement that plaintiffs establish "that damages
16 are capable of measurement on a classwide basis." Comcast Corp. v.
17 Behrend, 133 S. Ct. 1426 (2013). The parties disagree as to
18 whether Plaintiffs had made that showing. Plaintiffs have
19 submitted two expert reports, one of which includes a class-wide
20 damages measurement. See Mot. at 24-25; ECF No. 89-6 ("Preston
21 Rpt.") (filed under seal). Clorox has moved to exclude both of
22 Plaintiffs' expert reports on the grounds that the experts used
23 unreliable methods. ECF Nos. 114 (redacted version), 108-6
24 (unredacted version filed under seal). Because the Court denies
25 Plaintiffs' motion on other grounds, the thorough examination of
26 the experts' reports required to resolve this objection is
27 unnecessary. Clorox's motion to exclude the expert testimony is
28 therefore DENIED as moot.

3. Superiority of Class Action

The final Rule 23(b)(3) requirement is that a class action is superior to other available methods for fairly and effectively adjudicating the controversy. Relevant to determining the superiority of the class action are: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23; see also ConAgra Foods, 2014 WL 2702726, at *23-24.

The problems Plaintiffs face with ascertainability and predominance are both pertinent to superiority as well. The immense difficulty of determining class membership will make managing this case as a class action extremely complicated. That alone may be sufficient to preclude a finding that a class action is the superior method for resolving this case. See ConAgra Foods, 2014 WL 2702726, at *24 (finding it "not at all clear" that a class action was superior because "Plaintiffs have not proposed an adequate means of identifying each class member, which products each class member purchased, and how many products each class member purchased"). Additionally, the variations in Clorox's Fresh Step packaging during the proposed class period, and the fact that most class members likely never saw the allegedly misleading statements at all, create individualized questions that render a class action unmanageable. See id. (variations in product labels

1 during the proposed class period were relevant to manageability of
2 class action).

3 **V. CONCLUSION**

4 For the reasons set forth above, Plaintiffs' motion for class
5 certification is DENIED with respect to all five proposed sub-
6 classes.

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8 IT IS SO ORDERED.

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10 Dated: July 28, 2014



11 UNITED STATES DISTRICT JUDGE
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